United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1496

To be argued by
ALLEN R. BENTLEY

B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1496

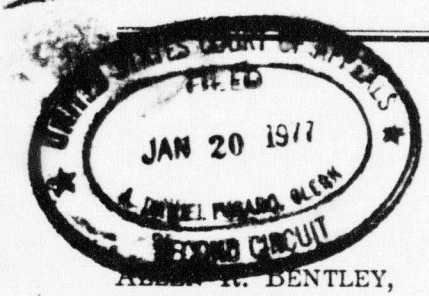
UNITED STATES OF AMERICA,
Appellant,

—v.—

RICHARD A. JACKSON, a/k/a "JOHN HARRIS",
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES OF AMERICA



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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

POINT I

This Court Has Jurisdiction To Require Correction of the Illegal Sentence Imposed on Jackson.

Jackson's brief focuses initially not on the question of whether or not the sentence imposed on him was legal, but on the assertion that this Court lacks jurisdiction to review that sentence. Jackson argues that since 18 U.S.C. § 3731 does not explicitly refer to Government appeals from denials of motions under Rule 35, the order in this case denying the Government's motion for correction of his sentence is immune from appellate review. This contention cannot stand. First, appellate jurisdiction is authorized herein by 28 U.S.C. § 1291. Alternatively, the legislative history of 18 U.S.C. § 3731 demon-

strates that Congress intended to authorize Government appeals in any case—such as this case—in which the constitutional guarantee against double jeopardy would not thereby be violated. Finally, even were this Court to conclude that neither 28 U.S.C. § 1291 nor 18 U.S.C. § 3731 provides appellate jurisdiction herein, the sentence at issue is so clearly illegal that the appeal should be treated as a petition for writ of mandamus, and the writ should issue to require vacatur of the sentence and resentencing of Jackson in compliance with the law.

Title 28, United States Code, Section 1291, provides that "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." In *Carroll* v. *United States*, 354 U.S. 394, 403 (1957), in holding that § 1291 did not provide jurisdictional footing for a Government appeal from the pre-trial grant of a suppression motion in a criminal case, the Court nevertheless commented that "certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U.S.C. § 1291 without regard to the limitations of 18 U.S.C. § 3731 . . ." With respect to the "very few" cases in which appellate jurisdiction to review orders in a criminal case could be grounded on § 1291, the Court noted that in *Stack* v. *Boyle*, 342 U.S. 1 (1951), appellate jurisdiction had been found to consider adefendant's appeal from an order denying a motion to reduce bail. 394 U.S. at 403. In addition, the Court pointed out that in other cases where an order in a criminal case was sufficiently distinct and independent, § 1291 sanctioned an appeal by either the Government or the defendant:

> "Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for

> the suppression or return of illegally seized property are appealable at once, as where the motion is made *prior to indictment*, or in a *different district* from that in which the trial will occur, or *after dismissal* of the case, or perhaps where the emphasis is on the *return of property* rather than its suppression as evidence. *In such cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision. Burdeau* v. *McDowell*, 256 U.S. 465." 354 U.S. at 403-04 (footnotes omitted) (final emphasis added).

The requirement of finality was clearly met in this case; since Jackson was convicted and sentenced before the Government's motion was made, denial of that motion was the last step in his criminal prosecution.* Nor can it be said that to entertain this appeal would be to give the Government a second opportunity to affix criminal liability on Jackson.** In short, there is no reason

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* As the Supreme Court has noted, a final order is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945).

** Jackson does not, and could not, raise a Double Jeopardy claim on this appeal. Reversal would entail no breach of the underlying premise of the Double Jeopardy Clause, that a defendant "not be twice tried or punished for the same offense," *United States* v. *Wilson*, 420 U.S. 332, 339 (1975), for if the sentence herein was illegal, it was void *ab initio*. Resentencing thus would not violate Jackson's constitutional rights, *Bozza* v. *United States*, 330 U.S. 160, 166-167 (1947); *In re Bonner*, 151 U.S. 242 (1894); *United States* v. *Mack*, 494 F.2d 1204 (9th Cir. 1974), *adhered to*, 509 F.2d 615 (9th Cir.), *cert. denied*, 421 U.S. 916 (1975); *United States* v. *Thomas*, 356 F. Supp. 173 (E.D.N.Y. 1972), *aff'd without opinion*, 474 F.2d 1336 (2d Cir. 1973), even if it were to result in an increase in the length of his incarceration, *Mathes* v. *United States*, 254 F.2d 938 (9th Cir. 1958) (sentence of probation vacated and mandatory term of five years' imprisonment imposed).

[Footnote continued on following page]

in either logic or the clear language of § 1291 for a finding that that provision, the jurisdictional route to review for *defendants* who have been convicted and sentenced, is unavailable to the Government in this case.

Second, the language and the legislative history of the present Criminal Appeals Act, 18 U.S.C. § 3731, reveal that the Act provides an alternative basis for appellate jurisdiction.

We submit that Jackson's statutory objection to the jurisdiction of the Court is foreclosed by *United States* v. *Wilson*, 420 U.S. 332 (1975), in which § 3731 was authoritatively construed to preclude the assertion of any nonconstitutional challenge to appellate jurisdiction over a Government appeal in a criminal case. In *Wilson*, the Court considered the question of whether § 3731 authorized a Government appeal from an order dismissing an indictment on grounds of pre-indictment delay, rendered after a verdict of guilty, and determined that it did. The Court noted that prior to adoption of the present Criminal Appeals Act, Government appeals in criminal cases were freighted with jurisdictional uncertainties arising from

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Nor does the present case bears any similarity to those in which it has been held that the imposition of a heavier sentence following re-trial after a defendant's successful appeal may violate the Due Process Clause. Such cases as *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973); *Moon* v. *Maryland* 398 U.S. 319 (1970); and *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), involved the increasing of an initially-valid sentence. Only last year, the Supreme Court noted, after reviewing *Pearce* and *Colten* v. *Kentucky*, 407 U.S. 104 (1972), that "Due Process is violated only by the *vindictive* imposition of an increased sentence." *Ludwig* v. *Massachusetts*, —— U.S. ——, 96 S. Ct. 2781, 2786 (June 30, 1976) (emphasis added). There is clearly nothing vindictive about the Government's consistently maintained position in this case. The Government's Rule 35 motion was based on its view of the proper construction of the statute in question. *Cf. United States* v. *Bishop*, 487 F.2d 631 (1st Cir. 1973).

the interplay of a statute (former § 3731) which spoke anachronistically of common law pleading and procedure, and caselaw (premised largely on the Double Jeopardy Clause of the Fifth Amendment) holding that the Government had no non-statutory authority to appeal in a criminal case. *See, e.g., United States* v. *Weller*, 401 U.S. 254 (1971); *United States* v. *Sisson*, 399 U.S. 267 (1970); *United States* v. *Mersky*, 361 U.S. 431 (1960); *United States* v. *Sanges*, 144 U.S. 310 (1892). The Court found that the legislative history of the present statute, 18 U.S.C. § 3731, enacted as Title III of the Omnibus Crime Control Act of 1970, Pub. L. 91-644, 84 Stat. 1890, effective January 2, 1971, showed that Congress intended to eliminate such jurisdictional issues by granting the Government as much appellate authority as it constitutionally could.*

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* The Court's summary of the legislative history, and the conclusions drawn from it, merit extended quotation:

> A bill proposed by the Department of Justice would have permitted an appeal by the United States "from a decision, judgment or order of a district court dismissing an indictment or information or terminating a prosecution in favor of a defendant as to any one or more counts, except that no appeal [would] lie from a judgment of acquittal." S. 3132; H.R. 14588. The Senate Report on this bill indicated that the Judiciary Committee intended to extend the Government's appeal rights to the constitutional limits. S. Rep. No. 91-1296, p. 18 (1970). Both the report and the wording of bill, however, suggested that the Committee thought the Double Jeopardy Clause would bar appeal of any acquittal, whether a verdict of acquittal by a jury or a judgment of acquittal entered by a judge. *Id.*, at 2, 8-12. At the same time, the Committee appears to have thought that the Constitution would permit review of any other ruling by a judge that terminated a prosecution, even if the ruling came in the midst of a trial. *Id.*, at 11.
>
> The Conference Committee made two important changes in the bill, although it offered no explanation for them.

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Congressional intent to eliminate jurisdictional arguments stemming from former § 3731 is reflected, moreover, in the final paragraph of present § 3731, unusual in a jurisdictional statute, providing that

> "The provisions of this section shall be liberally construed to effectuate its purposes."

One of the main purposes of the legislation, of course, was to "do away with unnecessary and perplexing jurisdictional problems in appeals by the Government in criminal cases," Remarks of Senator McClellan, Congressional Record, Oct. 8, 1970, vol. 117, pt. 26, p. 35659, by granting the Government statutory authority to appeal in all cases where consistent with the Double Jeopardy Clause.

The statutory injunction that its provisions "shall be liberally construed" fully disposes of Jackson's reliance

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H.R. Conf. Rep. No. 91-1768, p. 21 (1970). The Committee omitted the language purporting to permit an appeal from an order "terminating a prosecution in favor of a defendant," and it removed the phrase that would have barred appeal of an acquittal. In place of that provision, the Committee substituted the language that was ultimately enacted, under which an appeal was authorized "from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

These changes are consistent with the Senate Committee's desire to authorize appeals *whenever constitutionally permissible*, but they suggest that Congress decided to rely upon the courts to define the constitutional boundaries rather than to create a statutory scheme that might be in some respects narrower or broader than the Fifth Amendment would allow. In the light of this background *it seems inescapable that Congress was determined to avoid creating nonconstitutional bars to the Government's right to appeal.* 420 U.S. at 338-39 (emphasis added).

on pre-1970 cases holding that Government appeals in criminal cases are disfavored, Br. p. 7, a doctrine here inapplicable in any event because the result of a reversal on this appeal would not be improperly to expose Jackson to jeopardy a second time.* In view of Wilson's finding that in enacting present § 3731 Congress was seeking to eliminate "*all* statutory barriers to Government appeals and to allow appeals *whenever the Constitution would permit*," 420 U.S. at 337 (emphasis added). Jackson's statutory objection, so similar to the claims which prompted adoption of the 1970 amendments to § 3731, must be rejected.

Finally, if this Court finds that neither 28 U.S.C. § 1291 nor 18 U.S.C. § 3731 creates appellate jurisdiction, it should treat this appeal as a petition for a writ of mandamus, and grant the petition. Although the Court declined to do just that on an attempted Government appeal in *United States* v. *DiStefano*, 464 F.2d 845, 849-50 (2d Cir. 1972), the stated basis for the decision makes it entirely apparent why mandamus would be a proper remedy in this case. *DiStefano* noted that the district judge's action, dismissing an indictment because of un-

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* *United States* v. *Lane*, 284 F.2d 935 (9th Cir. 1960), relied on by Jackson, and *United States* v. *Gibbs*, 285 F.2d 225 (9th Cir. 1960), both specifically holding that the appellate courts lacked jurisdiction over Government appeals from the denial of Government Rule 35 motions, were premised on the "awkward and ancient," *United States* v. *Sisson*, 399 U.S. 267, 308 (1970), pre-1970 Criminal Appeals Act and are thus entitled to little if any weight on this appeal. To the extent that the Ninth Circuit, in *Lane*, rejected our view of jurisdiction under 28 U.S.C. § 1291, we suggest that that portion of the opinion, which is not supported by reason or precedent, is incorrect. The issue of whether the 1970 amendments to § 371 furnish a jurisdictional basis for Government appeals from Rule 35 denials has been raised, but not passed upon, in at least two cases. *United States* v. *United States District Court, Central District of California*, 509 F.2d 1352, 1354 (9th Cir.), *cert. denied sub nom. Rosselli* v. *United States*, 421 U.S. 962 (1975), and *United States* v. *Mehrmens*, 494 F.2d 1172, 1174 (5th Cir. 1974).

necessary delay in bringing the defendants to trial, was well within the authority vested in him by law. *Id.* at 850. Relying on *Will* v. *United States*, 389 U.S. 90, 95 (1967), which stated that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy," see also *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953), the Court refused to review the District Court's exercise of its discretion. In this case, by contrast and as specifically held in *United States* v. *Cruz*, Dkt. No. 76-1337, slip op. 503 (2d Cir. November 10, 1976), the District Court was without the "power", *United States* v. *DiStefano, supra*, 464 F.2d at 850, to impose the sentence it did, and its assertion of this power was nothing less than a "usurpation." This Court should thus require correction of the illegal sentence, imposed utterly without statutory authority, by issuing a writ of mandamus. *United States v. United States District Court, Central District of California*, 509 F.2d 1352 (9th Cir.), *cert. denied sub nom. Rosselli* v. *United States*, 421 U.S. 962 (1975). This is clearly a case where "the interests of the administration of justice are at stake," *United States* v. *Weinstein*, 452 F.2d 704, 712 (2d Cir. 1971), *cert. denied sub nom. Grunberger* v. *United States*, 406 U.S. 917 (1972).* Accordingly, mandamus should issue, if

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* It is difficult to overstate the critical public interest in insuring that those convicted of crimes against the United States be subject only to the penalties authorized by law. Rule 35 itself reflects this interest, since it neither precludes the Government from making a motion to correct an illegal sentence nor sets any time limit for such motions, providing that they may be made "at any time." Appellate review of the legality of a sentence should not depend on such fortuitous factors as whether the defendant appeals from his conviction or, as in *Cruz*, appeals from the denial of his *own* Rule 35 motion. It would be utterly anomalous if this Court, having found jurisdiction to correct the

[Footnote continued on following page]

made necessary by a resolution against the Government on both the jurisdictional bases we have discussed.

POINT II

The Denial of the Government's Rule 35 Motion Should Be Reversed.

In Point II of his brief, pp. 11-14, Jackson argues that the sentence imposed by Judge Brieant was valid, adopting in substantial measure the reasoning of the District Court in its opinions in this case, A. 41-50, and in *Kayamakcioglu* v. *United States*, 418 F. Supp. 356 (S.D.N.Y. 1976). Significantly, both opinions had been rendered before the Government filed its brief in *Cruz*. Thus, the arguments on which Jackson relies not only were answered in that brief, A. 54-75; they were presented to, and rejected by, the *Cruz* Court. This reply to Jackson's contentions on the merits of the sentence herein will therefore summarize responses presented in more detail in the Government's *Cruz* brief and in the *Cruz* opinion itself.

Jackson first claims that *Cruz* should be distinguished because there Judge Frankel had relied on § 5010(b) as authority for imposing a two-year maximum sentence, whereas here Judge Brieant relied on § 5010(d). The Government's brief in *Cruz*, however, made plain that § 5010(d) had been advanced as an alternative basis for

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illegal sentence in *Cruz*, where the Government did not object to the sentence when it was imposed did not make a Rule 35 motion and simply informed the District Court of its position by letter, but not in this case, where the Government pressed the same view of the statute at sentencing, in its Rule 35 motion, and on appeal.

fixed-ceiling sentences under the Youth Corrections Act, while at the same time it presented a textual analysis of the statute which showed that such a reading of § 5010(d) was untenable because, *inter alia*, it results in a conclusion that § 5010(c) is superfluous. A. 67-68. This Court, in *Cruz*, found that:

> "The emphasis in structuring the Act was on treatment of youthful offenders under the watchful eye of an informed professional body which would tailor the length of sentence actually to be served to fit the needs of the individual. Any provision for fixing a maximum term by the court is conspicuously absent save in the single instance contemplated by §§ 5010(c) and 5017(d), in which the court is to provide for the contingency that a serious offender may not be able to derive maximum benefit from the treatment in less than six years.
>
> This provision for extending the maximum in the limited class of cases provided for, with no provision for decreasing the maximum allowed the Commission for treatment in any case under the Act, is a strong indication that the Congress did not intend to authorize the option adopted by the district court here." Slip op. pp. 507-08.

Moreover, the holding in *Cruz* was not based only on § 5010(b), but on "the structure of the entire Act and the legislative history and studies during the decade preceding the passage of the Act in 1950," *United States* v. *Cruz*, slip op. at 506. There is nothing in the structure or legislative history of the Act which provides the slightest basis for treating sentences under subsection (b) differently from those under (d). If the Court in *Cruz* had found the sentence there imposed to be valid under § 5010(d) or under any other provision of the Youth Corrections Act, the opinion would certainly have so stated.

Nor, as we argued in *Cruz*, A. 70-71, can this sentence be sustained in the guise of resolving ambiguity in favor of lenity. The predicate "ambiguity" is simply absent from the statute, as the Court in *Cruz* held, slip op. pp. 506-508. Although a sentencing Judge has discretion in choosing which of the forms of punishment authorized by law should be imposed, *Dorszynski* v. *United States*, 418 U.S. 424 (1974); *cf. United States* v. *Tucker*, 404 U.S. 443 (1972), there is no rule of statutory construction which can make up for the lack of inherent judicial power to create a sentencing option that Congress has not authorized, *In re Bonner*, 151 U.S. 242, 256 (1894); *cf. United States* v. *Beacon Piece Dyeing & Finishing Co., Inc.*, 455 F.2d 216 (2d Cir. 1972); *United States* v. *Ellenbogen*, 390 F.2d 537 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968).*

Finally, this is not an appropriate case for a ruling on the validity of the Parole Commission Guidelines, 41 Fed. Reg. § 2.20 (1976), as applied to those committed under the Youth Corrections Act. The United States Parole Commission, the body responsible for administering the Act, is not a party to this litigation, and the record is thus devoid of evidence pertaining to the de-

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* In any event, we note that the sentence imposed was not in all respects more "lenient" than an indeterminate commitment under § 5010(b). Jackson's assertion, Br. p. 13 n.8, that his sentence did not preclude issuance of a § 5021 certificate because he might be unconditionally discharged before the expiration of his one-year term, § 5021(a), overlooks the requirement of § 5017(b) that a defendant be supervised on "conditional release" in the community for a period of at least one year before unconditional discharge. Thus, unlike even the *Cruz* sentence, this sentence, in requiring unconditional discharge after a period of one year, precludes the Parole Commission from issuing a § 5021 certificate in compliance with the Act.

velopment of the Guidelines, their purposes, and the extent to which they are in fact applied in Youth Corrections Act cases. Moreover, the validity of the Guidelines will be a moot issue if upon resentencing Judge Brieant adopts either of the recognized alternatives to an indeterminate sentence under § 5010(b)—imposition of probation under § 5010(a) (the sentence option ultimately selected by Judge Frankel in *Cruz*) or a sentence to a one-year term of incarceration as an adult—or if, upon Jackson's commitment under § 5010(b), the Parole Commission determines that release outside the Guidelines is warranted in Jackson's case. In any event, even a finding that the Guidelines as presently formulated are inconsistent with the policies underpinning the Youth Corrections Act would not justify judicial amendment of the Act to create an additional sentencing option, not authorized by Congress.

CONCLUSION

The order of the District Court should be reversed, and the case remanded for resentencing pursuant to this Court's decision in *United States v. Cruz*; in the alternative, this Court should issue a writ of mandamus ordering that remedy.

Respectfully submitted,

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